

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHNNIE CAMMARN
Claimant

VS.

ASSOCIATED INSULATION
Respondent

AND

ARCH INSURANCE COMPANY
Insurance Carrier

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Docket No. 1,055,623

ORDER

Respondent and its insurance carrier (respondent) requested review of the March 24, 2014, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on July 8, 2014.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant had a 5 percent functional impairment and a 69.25 percent work disability, based on the opinions of Dr. Stein and Dr. Murati.

Respondent argues the Board should modify the ALJ's Award and consider only the opinion of Dr. Stein, which would leave claimant with a 5 percent functional impairment,

and a 0 percent task loss averaged with a 100 percent wage loss, for a 50 percent permanent partial general (work) disability.

Claimant argues the Award should be affirmed in all respects.

The nature and extent of claimant's disability is the issue on appeal.

FINDINGS OF FACT

Claimant began working for respondent in May 2004 performing asbestos removal. Claimant was considered a full-time employee. He would go to the shop, load materials onto the truck and haul the materials to a location where he would then unload and set up.

Claimant had two accidents while working for respondent. The first was on February 4, 2010, when, as claimant was leaving the shop, he stepped onto a metal grate, his foot slipped out from under him and he fell on his lower back across the doorjamb.

Claimant worked light duty until the second accident on November 30, 2010. On that day, claimant felt a pop in his low back as he was maneuvering through a crawl space under a house. Claimant testified to being in pain since November 30, 2010. His back pain is sharp and constant and goes from his low back, down his right leg, which then goes numb all the way down to his toes. Moving around and bending irritates his back. He testified the numbness comes and goes about twice every three months.

Claimant continued to work for respondent on light duty until November 2011. He was laid off in November 2011 and has not worked anywhere since. He drew unemployment for 26 weeks.

The parties stipulated, for purposes of compensation, to the date of accident being November 30, 2010.

Claimant denies any preexisting problems with his low back and right leg. He cannot move as fast as he used to and he has trouble sleeping. He is only able to get three to four hours of sleep per night before he wakes up in pain.

When claimant was initially injured he was sent for treatment by respondent to the Wamego Emergency Room, where he was seen by Dr. Melanie Byram. Claimant received physical therapy and was released without restrictions. When claimant was injured in November 2010, he returned to Dr. Byram and was again sent to physical therapy. Claimant also received medical treatment on his own with Michael Schuster, M.D., but when he lost his insurance he could no longer afford the treatment. Dr. Schuster is a pain and spine physician with Maximum Performance Physical Therapy and Fitness. Claimant testified that he was also referred by Dr. Byram to Daniel Hinkin, M.D., at K-State Urgent

Care in Manhattan. Dr. Hinkin ordered an MRI of the low back, which revealed a pinched nerve. Claimant also met with Dr. Murati and Dr. Stein for evaluations.

Claimant attempted to find work on his own, but was not able to find anything. He was told by the local union representative that he would not be sent out for a job until he had a doctor's note stating he was 100 percent.

At the request of his attorney, claimant met with board certified rehabilitation and physical medicine specialist Pedro Murati, M.D., for an examination on June 28, 2011. He had complaints of low back pain, pressure in his ribs that sent pain to his low back¹ and right leg numbness. Dr. Murati examined claimant and diagnosed low back pain with signs and symptoms of radiculopathy and right SI dysfunction. Dr. Murati opined his diagnosis was, within reasonable medical probability, a direct result from the work-related injuries that occurred on February 4, 2010, and November 30, 2010, during claimant's employment with respondent. Dr. Murati recommended a bilateral lower extremity NCT/EMG to include the lumbar paraspinals, and a series of lumbar epidural steroid injections. If claimant failed to improve with conservative treatment, Dr. Murati recommended a surgical evaluation. For the SI joint dysfunction, Dr. Murati recommended cortisone injections to decrease inflammation. He also recommended physical therapy with possible instruction on the use of an SI belt and/or gait training, and anti-inflammatory and pain medication as needed.

Dr. Murati assigned temporary work restrictions, based on an 8 hour work day, of no crawling and no lifting, carrying, pushing or pulling more than 20 pounds, occasionally up to 20 pounds and frequently up to 10 pounds; rarely bend, crouch or stoop; occasionally sit, climb stairs, climb ladders, and squat; frequently stand or walk and alternate sitting, standing and walking.

Claimant met with Dr. Murati for another examination on July 10, 2012, with complaints of low back pain, right-sided mid back pain and right leg numbness. Dr. Murati again diagnosed claimant with low back pain with signs and symptoms of radiculopathy and right SI dysfunction. His diagnoses were, within reasonable medical probability, the direct results of the work-related injuries that occurred on February 4, 2010, and November 30, 2010, during claimant's employment with respondent. He recommended at least yearly follow-ups on claimant's low back in case of any complications that may ensue.

Dr. Murati assigned a 10 percent whole person impairment to claimant's low back based on Lumbosacral DRE Category III of the 4th edition of the *AMA Guides*. He also assigned permanent restrictions, based on an 8 hour day, of no crawling; no lifting, carrying, pushing or pulling more than 20 pounds, occasionally to 20 pounds, frequently to 10 pounds; no bending, crouching or stooping; rarely climb stairs, climb ladders and

¹ Claimant reported this complaint began within the last month of this visit.

squat; occasionally sit or drive; frequently stand or walk and alternate sitting, standing and walking.

Dr. Murati reviewed the task list of Jennifer Smidt and opined claimant could no longer perform 24 out of 31 tasks for a 77 percent task loss.

Claimant met with board certified neurological surgeon Paul Stein, M.D., at respondent's referral, for an examination on September 16, 2013. His main complaint was back pain. Claimant reported his pain started in his right lower back and extended down the right lateral thigh to the ankle. Claimant reported 80 percent of his pain is in the low back and 20 percent in right lower extremity. He reported trouble sleeping and said walking was uncomfortable. Sitting still and lying down were his most painful activities. Claimant rated his pain at 5 to 7 out of 10. Claimant reported that, on at least three occasions, his right lower extremity had become completely numb and he fell twice because of it.

Dr. Stein examined claimant and found no neurological deficit in the lower extremities, no spasm or focal tenderness but mild restrictions of the lumbar active range of motion and some discomfort into the right lower back with straight leg raising on the right. Ultimately, Dr. Stein diagnosed preexisting mild degenerative change with aggravation, contusion and lumbar sprain. He found claimant's symptomatology was causally related to the two incidents at work. He felt claimant had a permanent partial functional impairment of 5 percent to the body as a whole, under Lumbosacral DRE Category II of the *AMA Guides*.

Dr. Stein determined no structural injury had been shown in the lower back as to require medical restrictions for activities or work. He was not initially aware claimant had a 30 pound weight restriction. But he testified that information did not change his opinion that claimant was not in need of restrictions based on his findings. He also determined claimant had no task loss.

Claimant met with Ms. Smidt for a vocational assessment in January and February 2013. Claimant was not working at the time and had already collected unemployment benefits for a year. Ms. Smidt identified 31 tasks claimant had performed over the last 15 years through six different jobs. Ms. Smidt noted claimant lacked a high school education, was limited on his ability to return to work, faced significant barriers to employment and would benefit from assistance. Claimant did not finish high school and did not obtain his GED. This prevents him from being eligible for any jobs where a diploma or GED is a prequalification.

Claimant applied for social security disability after the vocational assessment with Ms. Smidt. Claimant could not name a job he did before that he could do now. Claimant utilizes a TENS unit to help with his pain. He is not taking any pain medication.

Claimant met with Steve Benjamin for a vocational assessment on January 17, 2014. Mr. Benjamin identified 32 tasks claimant has performed over the last 15 years. Mr. Benjamin opined that under the opinions of Dr. Stein, claimant should be able to return to work with respondent and not incur a wage loss. If claimant were unable to return to work with respondent, he should be able to return to work in a similar position and earn a similar or comparable wage. Mr. Benjamin went on to find that, under the opinions of Dr. Murati, claimant should be able to return to the open labor market, but not in the position he had with respondent at the time of the accident or any similar position. He would be limited in the positions available to him within the restrictions imposed by Dr. Murati.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

K.S.A. 44-510e 2000 Furse defines functional impairment as:

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁴

The ALJ determined that the 5 percent whole body rating was the most accurate indicator of the nature and extent of claimant's functional impairment. The Board agrees with that analysis and adopts same in this award.

K.S.A. 44-510e 2000 Furse, in defining permanent partial general disability, states that it shall be:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average

² K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 44-510e(a) 2000 Furse.

weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.⁵

The parties acknowledged claimant suffered a 100 percent wage loss resulting from this accident. The only remaining dispute centers around claimant's task loss. The opinions of Dr. Stein and Dr. Murati are wildly conflicting. Dr. Stein found claimant suffered no task loss, even considering the lifting restrictions claimant received and even with the limitations claimant displayed upon examination. Dr. Murati, on the other hand, assigned what appear to be rather significant restrictions, based upon claimant's somewhat limited findings on physical examination. The Board finds, based upon one rather conservative task loss opinion and one rather liberal opinion, that the truth lies somewhere in between. As was noted by the ALJ, the best indicator of claimant's task loss is an average of the two opinions, resulting in a 38.5 percent task loss. This, when averaged with claimant's 100 percent wage loss, results in a permanent partial general work disability of 69.25 percent. The Award of the ALJ is, therefore, affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has suffered a permanent functional impairment of 5 percent to the whole person followed by a permanent partial general work disability of 69.25 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated March 24, 2014, is affirmed.

⁵ K.S.A. 44-510e 2000 Furse.

IT IS SO ORDERED.

Dated this _____ day of August, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge